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State of Utah v. William J. Chevre : Brief of Appellant

Utah Court of Appeals

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DOCKET NO. 980375

IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	)	**BRIEF OF APPELLANT**
Plaintiff/Appellee,	)	
vs.	)	Case No. 980375-CA
WILLIAM J. CHEVRE,	)	priority no. 2
Defendant/Appellant.	)	

BRIEF OF APPELLANT

Appeal from an order of conviction for: Count I: UNLAWFUL POSSESSION OF A CONTROLLED SUBSTANCE WITH MORE THAT ONE POUND OF MARIJUANA, a third degree felony, in the Sixth Judicial District Court in and for Kane County, State of Utah, the Honorable Kay L. McKiff, Judge, presiding.

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JURISDICTIONAL STATEMENT

Jurisdiction to hear this appeal is conferred upon the above-entitled Court by S 78-2a-3(2)(f), Utah Code Annotated, 1953, as amended.

STATEMENT OF THE ISSUES AND STANDARD OF REVIEW (PRESERVATION OF APPEAL ON THE RECORD)

This is an appeal from a conditional plea of guilty to said third degree felony to allow the Appellant to challenge the Court's denial of Appellant's Motion to Suppress.

1. There was insufficient reasonable articulable suspicion to stop the Defendant's vehicle. Trooper Fox made his determination to stop the tractor-trailer under the misapprehension that he had the right to stop any tractor-trailer to check the driver's log book. Preserved for appeal at R. 130, p. 7. After the Trooper turned on the Defendant's vehicle and while looking for a place to stop him, the Trooper observed that one brake light out of four was out on the trailer. Preserved for appeal at R. 130, p. 7.

Conclusion of law in criminal cases are reviewed for correctness. State v. Thurman 846 P. 2d 1256 (Utah 1993). State vs Brown, 852 P.2d 851 (Utah 1992). Supporting authorities are: State vs Lopez, 873 P.2d 1127 (Utah 1994) and Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d (1968).

2. The Utah Highway Patrol Trooper unlawfully detained the Defendant after his initial reasons for the stop had been concluded. The Trooper's stated reasons for that extended detention was that he had observed the driver was extremely nervous, and (2) was unresponsive, and had a physically defective right arm. The drivers inability to carry on a decent conversation; dry mouth and licking of his lips are all consistent with nervousness. Preserved for appeal at R. 38, pp. 42-

47.

Conclusion of law in criminal cases are reviewed for correctness. State vs. Thurman 846 P.2d 1256 (Utah 1993). State v. Brown, 853 P.2d 851 (Utah 1992). Supporting authorities are: State v. Lopez, 873 P.2d 1127 (Utah 1994) and Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d (1968).

3. The State claims two grounds for searching the cab sleeper of the tractor, towit: (1) probable cause for the officer to believe that CNS stimulants would be in the vehicle (aka the automobile exception rule), and (2) to conduct an impound inventory.

During the extended detention of Mr. Chevre, the Trooper concluded (based upon some tests) that Mr. Chevre was under the influence of a CNS stimulant, but failed to articulate his probable cause for believing that illegal CNS stimulant would be found in the tractor cab. Preserved for appeal at R. 38, pp. 48-52.

The State failed to introduce the Utah Highway Patrol's impound inventory policies and therefore failed to establish that Trooper Fox followed such procedures when he searched the tractor cab. Preserved for appeal at R. 38, p. 53.

Conclusions of law are reviewed for correctness. Thurman, supra. Supporting authorities are: State v. Schlosser, 774 P.2d 1132 (Utah 1989), State v. Mendoza, 748 P.2d 181 and United States v. Hensley, 469 U.S. 221, 83 L.Ed.2d 604 (1985).

4. In the absence of well established department vehicle impound inventory policies and procedures authorizing its patrolmen to open sealed packages, it was a violation of the Defendant's rights under the Fourth Amendment of the Constitution of the United States Constitution and Article I, section 12 of the Constitution of Utah for Trooper Fox to open the

sealed package containing marijuana. Preserved for appeal at R. 38, pp. 53-54.

Conclusions of law are reviewed for correctness. Thurman, supra. Supporting authorities are: State v. Schlosser, 774 P.2d 1132 (Utah 1989). State v. Mendoza, 748 nP.2d 181 and United States vs Hensley, 469 U.S. 221, 83 L.Ed.2d 604 (1985).

STATEMENT OF THE CASE AND NATURE OF THE PROCEEDINGS

This is an appeal from a conviction of a third degree felony, Unlawful Possession of a Controlled Substance, More than One Pound of Marijuana. This conviction is based upon appellant's conditional plea of guilty to said charge to enable him to appeal the Trial Court's denial of his motion to suppress. (Addendum)

At the suppression hearing, counsel for the parties stipulated that the transcript of the preliminary hearing should be made a part of the record and considered by the Court as evidence on the suppression issues. The Court accepted the stipulation. (R. 130, p. 11)

STATUTES AND CONSTITUTION PROVISIONS

The controlling statutes and constitutional provisions are found in the Addendum.

STATEMENT OF FACTS

On July l8, l995, Utah Highway Patrolman Stanley B. Fox pulled over a west bound tractor trailer on U.S. Highway 89 in Kanab, Utah. (R. 131, p. 75, ll. 15-25) The tractor was being driven by the Defendant and the only other occupant was a male in the passenger seat. (R. 131, pp. 9-12 and p. 42, ll. 17-20). The Trial Court made the following findings of fact regarding the Troopers grounds for making the stop.

* * *

4. Tooper Fox decided to pull over the tractor trailer to check

the driver's log book.

5. As Trooper Fox was preparing to find a place to pull over the tractor trailer, he noticed an inoperable brake light on the trailer

6. Trooper Fox made the stop primarily to check the driver's log book and conduct a mechanical inspection. (R.103)

* * *

The trailer had four brake lights, two on each side.(R. 130, p. 16)[1]

Once the Trooper had made the stop, he talked to the driver (William Chevre) and noticed that Mr. Chevre was "pretty" nervous and that his left arm seemed "kinda" unresponsive and there seemed to be a physical defect of some type.(R.131, pp. 13-14) At about that time, the Trooper began to ask the Defendant questions relating to his log book and registration permits.(R.131, pp. 13-14) The Trooper then ask the Defendant out of the tractor to show him that the break light was out and a leaking oil seal. (R.131, 14-15) The Trooper had observed Mr. Chevre's extreme nervous condition; his inability to carry on a decent conversation, his cotton or dry mouth and continual licking of his lips. (R.131, p. 15, ll.19-24) The Trooper then invited Mr. Chevre into the Trooper's truck. The Trooper's purpose in having Mr. Chevre get into the Trooper's truck was to "... kind of go over the log book and have more discussion."(R. 131, pp.15-16, ll.15-1)

Once the Trooper had Mr. Chevre in the Highway Patrol truck, Trooper Fox ask Mr. Chevre

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[1]. Section 41-6-121.10, Utah Code Annotated (1953 as amended) provides: "Every motor vehicle, trailer, semitrailer, and pole trailer shall be equipped with two or more stop lamps meeting the requirements of the department, provided the department may by rule allow one stop lamp on any vehicle equipped with only one when it was made." (emphasis added)(R. 131, p.7, 11. 21-22)

to do some drug recognition tests (hereafter DRE) for the following reasons: inability to carry on a good conversation; cotton mouth, dry lips, his very nervous condition ("... his foot was-was virtually bouncing off the floor while he was seated in the vehicle.") and somewhat inconsistent answers on his where he had been. (R. 131, p. 17)

The Trooper then ask Mr. Chevre to engage in some drug recognition tests. (R. 131, p. 18, ll. 19-22) The drug recognition tests were then performed. (R. 131, pp. 19, 22-37) At the time, Trooper Fox had completed a drug recognition course, but did not hold a drug recognition evaluator's certificate because copies of the evaluations had not been sent in to the instructors and he had not sent in a resume. (R. 131, pp.21-22) Based on his training and the DRE evaluations, Trooper Fox determined that Mr. Chevre was under the influence of the central nervous system stimulant and placed him under arrest. (R. 131, p.37) The only violation the Trooper initially arrested the Defendant for was for driving under the influence (of drugs). (R. 131, pp. 38, ll. 24-3) Trooper Fox then opened and looked into the trailer. (R. 131, p. 89) Then he went to the cab of the tractor; entered, immediately opened the curtain to the closed off sleeper area (R. 131, p. 40, ll. 12-19), lifted up some blankets, saw some bundles wrapped in plastic and tore the corner off of one bundle revealing a green leafy substance with the appearance of marijuana. (R. 131, pp. 40-42 13-14)

SUMMARY OF ARGUMENTS

POINT I: The Utah Highway Patrolman stopped the tractor trailer being operated by Mr. Chevre for two reasons as follows: (1) to check his log book, and (2) the trailer had a brake light out. Apparently Trooper Fox was operating under a misapprehension that he had statutory authority to stop any and all commercial vehicles to check their log books.. There were four brake

lights on the rear of the tailer and section 41-6-121.00, Utah Code Annotated, 1953 as amended, only requires two brake lights on the rear of a vehicle. Therefore, Trooper Fox had insufficient reasonable suspicion or grounds to make the stop.

POINT II: The Trooper detained Mr. Chevre for further investigation after he had concluded his business regarding his stated reasons for the stop. After Trooper Fox had checked the log book and had shown Mr. Chevre the mechanical defects, he should have warned Mr. Chevre and sent him on his way.

POINT III: The investigation, "drug recognition evaluation" (DRE), that took place thereafter was not justified by the Trooper's observations that Mr. Chevre had a physical defect and displayed characteristics of nervousness. Therefore, Mr. Chevre's arrest was not justified and the search of the tractor trailer cannot be supported on the theory of search incident to arrest. The inability of Trooper Fox to articulate why any of his observations provided him with any probable cause to believe that CNS stimulants would be found in the tractor, is grounds for the Court to suppress the evidence found in the tractor. Further, Trooper Fox should have obtained a search warrant since the tractor trailer was not going anywhere and other officers were there to secure the tractor and its contents.

POINT IV: No Utah Highway Patrol impound inventory policies and procedures were received into evidence. Trooper Fox claims that he tore open one of the bundles he found under the covers in the sleeper compartment pursuant to an impound inventory. According to Bertine, infra, and Shamblin, infra, and since Trooper Fox did not follow department standardized procedures in doing so, the marijuana should be suppressed. Those case require that standardized policies and procedures be followed by law enforcement officers when they inventory the contents

of a vehicle pursuant to an impound.

ARGUMENT

POINT I

WAS THERE SUFFICIENT REASONABLE ARTICULABLE SUSPICION TO STOP AND EVEN IF THERE WAS, SHOULD THE TROOPER HAVE TERMINATED THE DEFENDANT'S DETENTION WHEN THE REASONS FOR THE STOP HAD BEEN DEALT WITH.

In this case trooper Fox made his determination to stop the Defendant's vehicle under the misapprehension that he had the right to stop any tractor trailer to check its log book. After a thorough search of the Utah Code, this author has concluded that nowhere in Utah law is a police officer authorized to stop a commercial or any vehicle for the purpose of checking a truck driver's log book. This author believes that the prosecution will concede that point.

After having made that erroneous decision and while following the tractor trailer looking for a place to pull it over, the Trooper noticed that a break light was out. Therefore, the question is as follows: Having determined to stop the vehicle on fallacious ground, is an after observed mechanical defect justification for an officer to stop the vehicle? After exhaustive research, this author has found no authority that is determinative. In State v. Lopez, 873 P.2d 1127 (Utah 1994), where the facts are similar to the instant case (but missing one fact), the Supreme Court held that an observed traffic violation (including a mechanical) defect is grounds for an officer to stop a vehicle. However, the missing fact is that the officer in (Lopez, supra), did not admit that he had formed the intent to stop before observing the mechanical problem. Therefore, the Defendant urges the Court to conclude that the Trooper would not have turned on the Defendant's vehicle

(commenced investigative procedures) had he not been mistaken as to the law and therefore, the stop was improper.

This Memorandum will leave that question unresolved and turn to the next issue which may well render the previous question moot. That is: Did the Defendant' detention extend beyond the time needed to clear the situation leading to the stop?

POINT II

DID THE TROOPER UNLAWFULLY DETAIN THE DEFENDANT AFTER HIS INITIAL REASONS FOR THE STOP HAD BEEN CONCLUDED.

Based upon the Trooper's sole remaining reason for the stop, towit: defective brake light, the encounter should have concluded with the Trooper issuing Mr. Chevre a citation or warning for defective equipment unless the Trooper could articulate observations arising prior thereto that gave rise to independent reasonable suspicion to pursue an investigation into the sleeping compartment of the tractor. The Trooper failed to so articulate.

From the facts it would appear that the appropriate time for the Trooper to terminate the detention would have been right after he had the driver out of the tractor and had shown him the oil leak and the defective break light.

The following is what had occurred prior to that point: the Trooper had made the stop; approached the cab, talked to the driver, observed that the driver was pretty nervous, that his left arm was unresponsive which the Trooper characterized as a physical defect, and had asked about the log book and registration permits. Also, by that time, the Trooper had probably observed what he characterized as the Defendant's "kind of...inability to carry on a decent conversation,"(R. 131, p.15), his dry mouth and the licking of his lips. It was at this point where the Trooper could

have and should have cited or warned Mr. Chevre for defective equipment.

The drivers inability to carry on a decent conversation; dry mouth and licking of his lips are all consistent with nervousness. Neither nervousness nor a physically defective left arm give rise to reasonable articulable suspicion that Mr. Chevre was engaged in criminal conduct. That leaves extreme nervousness as the reason for the stop.

In State v. Schlosser, 774 P.2d 1132 (Utah 1989), the following facts were at hand: The officer observed the driver doing 42 mph in a 35 mph zone, while stopping the vehicle he observed the passenger of the pickup bending over, acting fidgety, turning left to right, and turning back to look at the officer. Also, when the stop was made, the driver met the officer between the two vehicles and the passenger continued to move about in the cab causing the officer to conclude that the passenger was trying to hide something. The officer then approached the passenger door; tapped on the window and immediately opened the door whereupon the officer saw marijuana and paraphernalia in the cab in plain view. In that case (Schlosser, supra), the Utah Supreme Court sustained the trial court's suppression of the evidence and in doing so wrote the following:

* * *

> The state argues that the officer's opening the door constituted an extension of an "investigative detention" and that the officer's actions were lawful because defendants' activities gave rise to a reasonable suspicion either of criminal activities or of danger to the officer's personal safety. Therefore, the State asserts that the judge erroneously applied a probable cause standard instead of a reasonable and articulable suspicion standard in the hearing on the motion to suppress. As stated above, Officer Howard's action of opening the car door constituted a search, not an investigative detention, and therefore, the probable cause standard was correctly applied by the trial court. However,

even if the State's premise were accepted that no search occurred, the facts do not support a reasonable and articulable suspicion standard in the hearing on the motion to suppress. As stated above, Officer Howard's action of opening the car door constituted a search, not an investigative detention, and therefore, the probable cause standard was correctly applied by the trial court. *However, even if the State's premise were accepted that* no search occurred, the facts do not support a reasonable and articulable suspicion of criminal activity which is necessary to support the State's position. See State v. Dorsey, (Citation omitted); State v. Carpena, (Citation omitted); State v Swanagan, (Citation omitted).

An investigative detention is justified if a police officer has a reasonable and articulable suspicion that the automobile's occupants are "involved in criminal activity." United States v. Hensley, 469 U.S. 221, 226, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985); Dorsey, 731 P.2d at 1087, 1090. Additionally, an officer may search a vehicle for weapons if he has a reasonable belief that the suspect is dangerous and "may gain immediate control of weapons." Michigan v. Long, 463 U.S. 1032, 1049, 103 S.Ct. 3469, 3481, 77 L.Ed.2d 1201 (1983). In such instances, "due weight must be given, not to [the officer's] inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 1883, 20 L.Ed.2d 889 (1968).

Here, Officer Howard had no probable cause, and no articulable suspicion either that his safety was in danger or that the occupants were engaged in criminal activity. He cited no safety concerns as the basis for his actions; he sought only to investigate the possibility that defendants were engaged in illegal activity, and for that reason he opened the passenger door. Compare United States v. Pajari, 715 F.2d 1378, 1382 (8th Cir.1983) (driver's nervousness coupled with information from multiple informants and previous police observations provided reasonable, articulable suspicion for investigative stop) with Jones v. United States, 391 A.2d 1188, 1191 (D.C. 1978) (furtive gestures by a passenger and location of vehicle and time of stop did not "rise to the level of articulable

suspicion").

Officer Howard's testimony does not support an articulable suspicion of criminal activity. Mere furtive gestures of an occupant of an automobile do not give rise to an articulable suspicion suggesting criminal activity. See People v. Superior Court of Yolo County, 3 Cal.3d at 821-24, 478 P.2d at 457-59, 91 Cal.Rptr. at 737-39 (passenger's actions of turning and putting her arm over the back of the seat, then facing forward, bending down towards floor, and then resuming normal position did not support probable cause to search); Spence v. State, 525 So.2d 442 (Fla.App. 1988) (leaning down as if putting something on floorboard did not justify officer's suspicion); People v. Mills, 115 Ill. App. 3d 809, 71 Ill.Dec. 247, 450 N.E.2d 935 (1983) (defendant's fast movements and leaning forward as officer approached did not create reasonable suspicion).

Schlosser's movements, turning to the left and to the right, appearing fidgety, bending forward, and turning to look at the officer, do not, without more, show a reasonable possibility that criminal conduct had occurred or was about to occur. Schlosser may have been attempting to locate a driver's license. He could have been preparing for conversation with the officer by turning down the volume on the radio or extinguishing a cigarette. He may also have been putting away food and beverages, changing a baby's diaper, putting on the parking brake or doing a host of other innocuous things. When confronted with a traffic stop, it is not uncommon for drivers and passengers alike to be nervous and excited and to turn to look at an approaching police officer. See State v. Mendoza, 748 P.2d 181, 184 (Utah 1987). A search based on such common gestures and movements is a mere "hunch," not an articulable suspicion that satisfies the Fourth Amendment. (emphasis added.)

A driver's leaving the vehicle to talk to the officer, as Lowder did, is also reasonable behavior and not indicative of criminal conduct. Pennsylvania v. Mimms, 434 U.S. at 110, states that a driver's exiting his vehicle to talk with a police officer may actually be safer for the officer than for him to talk to the driver who remains inside the vehicle. See also People v. Superior Court, 3 Cal. 3d at 826-27, 478 P.2d at 462, 91 Cal.

> Rptr. at 742. Officer Howard did not point to anything which made Lowder's exiting the truck unusual or suspicious. Lowder had his driver's license and registration in hand, but that is neither unreasonable nor so suspicious as to give rise to an inference of illegal activity.
>
> In short, the trial court did not err in ruling that the facts do not support an articulable suspicion of criminal activity. [5] (emphasis added)

* * *

Another way to analyze the "reasonable suspicion of criminal activity" issue is the ask the following question: At the point where the Trooper had shown Mr. Chevre the mechanical defect, what had the Trooper observed that would give rise to reasonable suspicion of what criminal activity? The answer is NONE. What criminal activity? NONE. Based on Trooper Fox's observation up to that point, no reasonable person and no reasonable police officer could have articulated in what criminal activity Mr. Chevre was suspected of being engaged.

Therefore, it is respectfully submitted that the Trooper should have terminated his detention at that point by issuing Mr. Chevre a citation or warning for defective equipment. It also follows that the investigation (DRE) that took place thereafter was unjustified and that the Defendant's arrest as a result thereof was improper.

POINT III

WAS THE SEARCH JUSTIFIED BY THE "PROBABLE CAUSE"; "IMPOUND INVENTORY", OR "SEARCH INCIDENT TO ARREST" EXCEPTIONS TO THE SEARCH WARRANT REQUIREMENT OF THE FOURTH AMENDMENT TO THE U.S. CONSTITUTION.

The State claims two grounds for searching the cab sleeper of the tractor, towit: (1) probable cause for the officer to believe that CNS stimulants would be in the vehicle (aka the automobile exception rule), and (2) to conduct an impound inventory. (R. 131, p.40, 11.2) Implicit in Trooper Fox's testimony is the additional grounds of search incident to arrest.

First follows an analysis of the Trooper's reasonable suspicion to believe that a CNS stimulant would be found in the cab or sleeper.

After the DRE, Trooper Fox, arguendo, had reasons to believe that Mr. Chevre was under the influence of a central nervous system (CNS) stimulant he arrested the Defendant and searched the sleeper compartment of the cab. However, one must ask, whether that gives rise to a reasonable belief that CNS stimulants would be found in the vehicle. Based on Trooper Fox's observations of the Defendant, Trooper Fox formed a suspicion that Mr. Chevre was under the influence of a CNS stimulant, i.e., that Chevre had ingested a CNS stimulant. Nowhere does Trooper Fox articulate why that would make him think that such a stimulant would be found in the vehicle. Further, there is at least one legal CNS stimulant, towit: caffeine. (R. 131, pp. 84, 11. 22-25 through 85, 11. 1-7)

* * *

> ... , even if the circumstances are such that the police are excused from the necessity of having a search warrant for an automobile, they are nonetheless authorized to conduct a search of a vehicle for evidence only if they possess probable cause that particular items of evidence are presently concealed therein. (emphasis added)
>
> * * *

Wayne R. LaFave, Search and Seizure, Second Edition 1987, section 5.2 (c).

An example of where the Court found such sufficient probable cause is U.S. v. Jones, 452

F.2d 884 (8th Cir, 1971). In that case the Defendant was stopped after he made an illegal turn; ran a red light while driving a car without a plate and when the officer approached he saw the Defendant tear up a piece of paper and push the pieces between the seat and the cushion. When the officer retrieved the torn pieces of paper they turned out to be a stolen welfare check. In other words, the officer articulated probable cause to believe that the Defendant was hiding contraband.

It has been well established since Chimel v. California, 395 US 752, (S.Ct. 1969) that because of the moveable nature of automobiles, under certain circumstances a search warrant may not be required. One of those circumstances is that the officers can articulate probable cause to believe that particular items of contraband may be located in the vehicle. Observations of the Trooper that, arguendo, caused him to reasonably believe that Mr. Chevre was under the influence of a CNS stimulant are not grounds for him to believe that he would find such a substance in Defendant's vehicle. To the contrary, such a finding by Trooper Fox would reasonably cause him to believe that Mr. Chevre had ingested a CNS stimulant. The absence of any attempt by Trooper Fox to articulate why any of his observations (prior to the search) provided him with probable cause to believe that CNS stimulants would be found in the tractor, should give the Court pause in concluding that he had probable cause to believe that illegal CNS stimulants might be found in the vehicle.

However, probable cause is not the only requirement of the "automobile exception" rule.

In State v. Christensen, 676 P.2d 408, (Utah 1984), the Utah Supreme Court clearly outlined the requirements of the "automobile exception" rule in Utah, as follows:

* * *

> ... there is probable cause to search an automobile stopped on the highway; the car is movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained. (emphasis added)
>
> * * *
>
> For this exception to apply, the police must have probable cause to believe that the automobile contains either contraband or evidence of a crime and that they may be lost if not immediately seized. ... (emphasis added)
>
> * * *

In the instant case the last requirement is missing. The tractor was not going anywhere. The driver and the passenger could be secured (R. 131, p. 42, ll. 8-23); the trooper could have and should have secured the keys and the tractor. Also, a second officer was present (R. 131, p. 10, ll. 10-15) and a third officer arrived before Trooper Fox left the scene of the stop. (R. 131, 100, ll. 12-20)

The United States Supreme Court defines probable cause as facts and circumstances within (the officers') knowledge sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. *See United States vs Cortez*, 449 U.S. 411, 417-418 (1981). The State bears the burden of establishing both probable cause and exigent circumstances in order for a warrantless search to fall within the automobile exception under Art. I, Section 14 of the Utah Constitution. *See, State v. Larrocco*, 794 P.2d 460, 470 (Utah 1990).

In *State vs Robinson*, 797 P.2d 431 (Utah App. 1990), the court held that troopers did not have reasonable suspicion of criminal activity necessary to justify continued detention and questioning of defendants once a warning citation was given and purpose for initial stop had been accomplished. In *Robinson,* Defendants appealed their conviction of unlawful possession of a

controlled substance found while troopers were conducting a routine traffic stop. Officers stopped the vehicle for improper passing. The officers made a routine check on the driver's license and vehicle registration and found the vehicle was not registered to either of the occupants. The defendants explained that their boss at a floor covering business had allowed then to take the work van on a two week fishing trip to Wyoming. While checking out their story, the officers noted the nervousness of the occupants. and observed that a homemade bed, two feet high, filled the back of the vehicle. Based on what they observed the trooper determined to ask for consent to search the vehicle. *Id.*, *at* 433. The Defendant, Robinson, consented and the troopers observed five marijuana seeds in the rear corner of the van. When the officers failed to get consent from Robinson to look under the bed, the officers stated that they would attempt to get a search warrant. Officer Ogden then asked Robinson, "Since you won't let us take the plywood panel off the van to look under the bed, would it be all right if we let a dog go through the vehicle?" Robinson replied, "yes" and asked if allowing the dog to sniff meant giving consent to search. The Officer said "yes" and Robinson shook his head affirmatively. The defendants were later arrested when the dog gave a positive alert at the rear of the bed and trooper located eight duffel bags of marijuana in the space under the bed. *Id.*, at 434. The court concluded the in light of the troopers' questioning and conduct, the coercive atmosphere at the time, and the other surrounding circumstances, the State had not borne its burden that consent to search the vehicle was voluntary. They reached the same conclusion about Robinson's subsequent consent to allow the narcotics dog to search the van interior. *Id.*, at 438

The issue raised by this Defendant is not a "consent" issue, however, the analysis used by the Robinson (supra) Court is applicable to the facts of this case.

Trooper Fox testified that the first thing he did after arresting Mr. Chevre was to open the trailer to look for evidence of CNS stimulants]. (R. 131, 89, ll. 2-17) The next thing that Trooper Fox did was enter the cab of the Tractor, going immediately to the sleeper. Trooper Fox testified that the first thing that he did upon entering the cab was to open the curtains to the sleeper. (R. 131, p.40, ll. 12-19). Trooper Fox never articulated why he thought drugs would be found in the cab of the tractor or in the sleeping compartment.

POINT IV

IN THE ABSENCE OF WELL ESTABLISHED IMPOUND INVENTORY POLICIES AND PROCEDURES AUTHORIZING THE OFFICER TO OPEN SEALED PACKAGES, IS IT A VIOLATION OF DEFENDANT'S CONSTITUTIONAL RIGHTS FOR THE OFFICER TO OPEN THE SAME.

Trooper Fox characterized his search of the cab of the tractor as being an impound inventory. (R 131, p.90, ll. 5-14) It is a well founded constitutional principle that a police officer may not open sealed or closed containers during an impound inventory unless he is acting in accordance with standardized, specific department procedure mandating the opening of all such containers. See Colorado v. Bertine, 479 U.S. 367 (1987) and State v. Shamblin, 763 P.2d 425 (Utah App. 1988). Pursuant to Trooper Fox's "impound inventory" of the sleeper compartment of the cab of the tractor, he tore open the corner of a bundle wrapped in plastic and observed marijuana therein. (R. 131, p. 41) Since this was a warrantless search, the burden is upon the state to establish that the Trooper followed such standardized and specific department procedures. (State v. Shamblin, supra). No such department written policies and procedures were received into evidence at the

preliminary hearing or the suppression hearing held in this case. There is nothing in the transcript that even suggests whether or not the Utah Highway Patrol's policies and procedures regarding impound inventory procedures requires its officers to open closed packages and/or containers. Thus the State has completely failed to meet its burden in that regard and as a result the Court has no choice but to suppress the marijuana evidence in this case.

The Utah Court of Appeals at page 3 of the (Shamblin case, supra), clearly sets forth its reasoning for said result, as follows:

* * *

> We read Bertine to establish that the Fourth Amendment is violated if closed containers are opened during a vehicle inventory search in the absence of a standardized, specific procedure mandating their opening. Such a procedure precludes the possibility that officers conducting inventory searches will act arbitrarily and only selectively open containers. Further, such a procedure insulates police from claim that, in a particular case, their opening closed containers was nothing more than a 'fishing expedition.' It also promotes a certain equality of treatment... .

* * *

In any event, Trooper Fox claims that he tore open (searched) the bundle he found under the covers in the sleeper compartment pursuant to an impound inventory and according to (Bertine, supra), and (Shamblin, supra), the marijuana must be suppressed for lack of evidence that he followed a written standardized department policy requiring that he open all such containers.

CONCLUSION

The Utah Highway Patrolman lacked sufficient reasonable suspicion to stop the Appellant's vehicle. Based upon the Trooper's alleged reason for the stop, towit: (1) to check the

log book and (2) defective brake light, the encounter should have concluded with the Trooper issuing Mr. Chevre a citation or warning for defective equipment.

It is respectfully submitted that the Trooper should have terminated Mr. Chevre's detention at that point by issuing Mr. Chevre a citation or warning for defective equipment. It also follows that the investigation (DRE) that took place thereafter was unjustified and that the Defendant's arrest as a result thereof was improper. The absence of any attempt by Trooper Fox to articulate why any of his observations (prior to the search) provided him with any probable cause to believe that CNS stimulants would be found in the tractor, is the grounds for the Court to suppress the evidence found in the tractor. Further, Trooper Fox should have obtained a search warrant since the tractor trailer was not going anywhere and other officers were there to secure the tractor and its contents.

The Bertine, supra, rule requires officers to follow written standardized department policy when doing an inventory of an impounded vehicle. No evidence was presented to show what those policies were. Thus the evidence seized from the sleeper compartment should be suppressed.

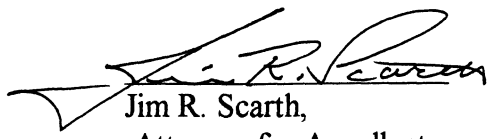
Trooper Fox claims that he tore open (searched) one of the bundles he found under the covers in the sleeper compartment pursuant to an impound inventory and according to Bertine,

/ / /

supra, and Shamblin, supra, and since he did not follow department standardized procedures in doing so, the marijuana must be suppressed.

Respectfully submitted.

DATED this 23rd day of December, 1998.



Jim R. Scarth,
Attorney for Appellant

CERTIFICATE OF HAND DELIVERY/FAXING/MAILING

I HEREBY CERTIFY that two full, true, correct copies of the above and foregoing document was _____hand delivered, _____faxed and/or ___✓___mailed, first class mail, postage fully prepaid, this 23rd day of December, 1998, to: Jan Graham, Attorney General, at: 236 State Capitol, Salt Lake City, UT 84114.

ADDENDUM

COLIN R. WINCHESTER [4696]
KANE COUNTY ATTORNEY
ERIC D. PETERSEN [7424]
DEPUTY KANE COUNTY ATTORNEY
76 North Main Street
Kanab, Utah 84741
Telephone: (435) 644-5278
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IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY

STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. WILLIAM JOSEPH CHEVRE, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW Case No. 951600068 JUDGE K. L. McIFF

This matter came before the Court on October 27, 1995, pursuant to Defendant's Motion To Suppress. The State of Utah was represented by Colin R. Winchester, Kane County Attorney. The Defendant was present and was represented by counsel, Jim R. Scarth. The parties presented evidence and argued their respective positions. Counsel then requested that they be allowed to submit written memoranda in support of their respective positions. On November 22, 1996, the matter came before the Court for additional argument and the issuance of the

Court's decision. The Court, having heard the testimony, having reviewed the parties' memoranda, and having heard the arguments of counsel, now therefore enters the following:

FINDINGS OF FACT

1. On July 18, 1995, Utah Highway Patrolman Stanley B. Fox pulled over a westbound tractor trailer on U.S. Highway 89 in Kanab, Utah.

2. The tractor was being driven by the Defendant, and the only other occupant was an adult male in the passenger seat.

3. Trooper Fox was accompanied by State Safety Inspector David Shiers.

4. Trooper Fox decided to pull over the tractor trailer to check the driver's log book.

5. As Trooper Fox was preparing to find a place to pull over the tractor trailer, he noticed an inoperable brake light on the trailer.

6. Trooper Fox made the stop primarily to check the driver's log book and conduct a mechanical inspection.

7. Once Trooper Fox made the stop, he talked to the Defendant, and noticed that the Defendant was "pretty" nervous, that his left arm seemed "kinda" unresponsive, and that the Defendant seemed to have a physical defect of some type. Trooper

Fox noticed that the Defendant's foot "was virtually bouncin' off the floor."

8. Trooper Fox began to ask the Defendant questions relating to his log book and permits.

9. Trooper Fox observed the Defendant's extreme nervous condition, his inability to carry on a decent conversation, his cotton mouth or dry mouth, and his continual licking of his lips.

10. Trooper Fox asked the Defendant to get out of the tractor to show him the inoperable brake light, and a leaking oil seal, and to review the log book and have more discussion.

11. Once Trooper Fox had the Defendant in his patrol vehicle, he asked the Defendant to perform some drug recognition tests for the following reasons: inability to carry on a conversation, cotton mouth, dry lips, very nervous condition, and somewhat inconsistent answers regarding his whereabouts.

12. The Defendant complied, and performed some of the drug recognition tests.

13. At the time, although Trooper Fox had completed a drug recognition course, he did not hold a drug recognition evaluator's certificate because copies of the evaluations he had performed as part of his training had not been sent in to the instructors, and because he had not yet sent in a resúme.

14. Based on his training and the drug recognition evaluation, Trooper Fox determined that the Defendant was under the influence of a central nervous system stimulant.

15. Trooper Fox then placed the Defendant under arrest for driving under the influence of drugs.

16. After placing the Defendant under arrest, Trooper Fox opened and looked into the trailer.

17. The passenger did not have a commercial driver's license.

18. Trooper Fox then returned to the tractor to search for a central nervous stimulant and to conduct an inventory search, because the truck was going to be impounded.

19. Upon returning to the tractor, Trooper Fox opened the curtain to the sleeper area, saw something large under some blankets, and removed the blankets, all to ensure that no one was in the sleeper area.

20. Instead of finding a person, Trooper Fox found several large bundles wrapped in contact paper.

21. Trooper Fox tore open the corner of one bundle, having assumed the contents to be marijuana, based on training he had received.

22. Ultimately, the bundles were weighed, and found to contain 159.04 kilograms (350.6 pounds) of marijuana.

CONCLUSIONS OF LAW

1. The initial stop of the tractor trailer was legitimate because of the defective brake light on the trailer. Trooper Fox's decision to stop the tractor trailer to examine the driver's log book, which was made prior to the discovery of the defective brake light, does not adversely affect the legitimacy of the stop.

2. Based on Defendant's noted physical characteristics while Trooper Fox was at the tractor door, i.e., Defendant's nervous condition, his "kinda" unresponsive arm, his bouncing foot, his inability to carry on a conversation, his cotton mouth or dry mouth, the continual licking of his lips, and his inconsistent answers about his whereabouts, Trooper Fox was justified in asking Defendant out of the tractor, and was justified in having Defendant perform the drug recognition tests.

3. After Defendant was arrested for driving under the influence of a central nervous stimulant, it was reasonable for Trooper Fox to return to the tractor to perform an inventory search of the tractor.

4. It was reasonable for Trooper Fox to open the curtain to the tractor's sleeper area, and to remove the blankets to ensure that no one was under them.

5. Based on Trooper Fox's training, it was reasonable for him to tear the corner of one of the bundles to examine the contents.

DATED this ~~14th~~ 12th day of ~~November~~ Dec, 1997.

BY THE COURT:

K. L. McIFF
District Court Judge

CERTIFICATE OF SERVICE

I certify that on the 30th day of May, 1997, I served a true and correct unsigned copy of the foregoing *FINDINGS OF FACT AND* CONCLUSIONS OF LAW to each person or entity listed below:

Jim R. Scarth (via hand delivery)
P. O. Box 160
St. George, UT 84771

Marie P. Budd

CERTIFICATE OF SERVICE

I certify that on the 12th day of ~~November~~ December, 1997, I served a true and correct signed copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW to each person or entity listed below:

Jim R. Scarth (via first class mail)
P. O. Box 160
St. George, UT 84771

Marie P. Budd

COLIN R. WINCHESTER [4696]
KANE COUNTY ATTORNEY
ERIC D. PETERSEN [7424]
DEPUTY KANE COUNTY ATTORNEY
76 North Main Street
Kanab, Utah 84741
Telephone: (435) 644-5278
Facsimile: (435) 644-2281

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY

STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. WILLIAM JOSEPH CHEVRE, Defendant.	ORDER DENYING MOTION TO SUPPRESS Case No. 951600068 JUDGE K. L. McIFF

This matter came before the Court on October 27, 1995, pursuant to Defendant's Motion to Suppress. The State of Utah was represented by Colin R. Winchester, Kane County Attorney. The Defendant was present and was represented by counsel, Jim R. Scarth. The parties presented evidence and argued their respective positions. Counsel then requested that they be allowed to submit written memoranda in support of their respective positions. On November 22, 1996, the matter came before the Court for additional argument and the issuance of the

Court's decision. The Court heard the testimony, reviewed the parties' memoranda, heard the arguments of counsel, and entered its Findings of Fact and Conclusions of Law.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that Defendant's motion to suppress the evidence is denied.

DATED this 12 day of ~~November~~ Dec, 1997.

BY THE COURT:

K. L. McIFF
District Court Judge

CERTIFICATE OF SERVICE

I certify that on the 30th day of May, 1997, I served a true and correct unsigned copy of the foregoing ORDER DENYING MOTION TO SUPPRESS to each person or entity listed below:

Jim R. Scarth (via hand delivery)
P. O. Box 160
St. George, UT 84771

Glen Winchester

CERTIFICATE OF SERVICE

I certify that on the 12th day of ~~November~~ December, 1997, I served a true and correct signed copy of the foregoing ORDER DENYING MOTION TO SUPPRESS to each person or entity listed below:

Jim R. Scarth (via first class mail)
P. O. Box 160
St. George, UT 84771

Marvel P. Judd

COLIN R. WINCHESTER [4696]
KANE COUNTY ATTORNEY
ERIC D. PETERSEN [7424]
DEPUTY KANE COUNTY ATTORNEY
76 North Main Street
Kanab, Utah 84741
Telephone: (435) 644-5278
Facsimile: (435) 644-2281

IN THE SIXTH JUDICIAL DISTRICT COURT IN AND FOR KANE COUNTY

STATE OF UTAH

THE STATE OF UTAH, Plaintiff, v. WILLIAM JOSEPH CHEVRE, Defendant.	CONVICTION ORDER Case No. 951600068 JUDGE K. L. McIFF

This matter came before the Court for a change of plea on May 15, 1998. The State of Utah was represented by the Kane County Attorney, Colin R. Winchester. The Defendant was present and was represented by counsel, Jim R. Scarth. The State moved to amend Count 1 of the Information to charge Unlawful Possession of a Controlled Substance, More Than One Pound of Marijuana, a Third Degree Felony, and that motion was granted by the Court. The Defendant pleaded conditionally guilty to Amended Count 1, reserving the right to appeal the denial of his motion to

suppress. The State moved to dismiss Counts 2, 3, 4, and 5, and that motion was granted by the Court.

BASED ON THE FOREGOING, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. Defendant's conditional plea of guilty is freely and voluntarily made, and it is ordered that the Defendant's conditional plea, as set forth herein, be accepted and entered.

2. Sentencing is stayed until Defendant's appeal of the denial of the motion to suppress is resolved.

3. Defendant shall remain free on bail pending further action in this matter.

4. Defendant has 30 days from May 15, 1998, to move to withdraw his conditional plea of guilty, and 30 days from date hereof in which to file his appeal.

DATED this 10th day of June, 1998.

BY THE COURT:

K. L. McIFF
District Court Judge

CERTIFICATE OF SERVICE

I certify that on the 21st day of May, 1998, I served a true and correct unsigned copy of the foregoing CONVICTION ORDER to each person or entity listed below:

Jim R. Scarth (via first class mail)
P.O. Box 160
St. George, Utah 84770

Colin Winchester

CERTIFICATE OF SERVICE

I certify that on the 10th day of June, 1998, I served a true and correct signed copy of the foregoing CONVICTION ORDER to each person or entity listed below:

Jim R. Scarth (via first class mail)
P.O. Box 160
St. George, Utah 84770

Adult Probation and Parole (via first class mail)
835 East 300 North #500
Richfield, Utah 84701

Kane County Sheriff (via hand delivery)
76 North Main Street
Kanab, Utah 84741

Colin Winchester

Sec. 14. [Unreasonable searches forbidden — Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and *no Warrants shall issue, but upon probable* cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.